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72

PETITION

For *Alexander Fordice*, and *Thomas Calder*,

Against
Robert Calder,

MY Lords of Council and Session, unto your Lordships humbly means and shews; Your Servitor *Alexander Fordice*, and *Thomas Calder*, Merchants in *Elgin*: That where there was a Contract dated the 3d. of *April* 1696 years betwixt us and *Robert Calder* Baillie in *Weick*, whereby the said *Robert* Sold and Disposed to us 440 sufficient salt Hydes, at the making of *John Naughtie* Merchant in *Weick*, and *John Gilzean* Shoe-maker in *Elgin*; and in case of Variance, all Differences are referred to me the said *Alexander Fordice*: And the said *Robert* Band and Obliged him to deliver to us or our Order the said Hydes at the Boat-side in the Water of *Weick* any time we pleased to call for them betwixt and the first of *June* then next, under the Failzie of Four Pound Ten Shilling Scots for ilk undelivered Hyde as the said Contract bears; But the said *Robert* failzieing to perform, we were necessitat to Charge him for the foresaid Four Pound Ten Shilling agreed on for each undelivered Hyde; which Charge he hath Suspended, and the Suspension being called before the Lord *Halcrange* Ordinary: It was alledged for the Suspender, that he was only obliged to Deliver the Hydes when called for betwixt and the first of *June*; so that unless he could submit that we had required the Hydes, he had not Incurred the Penaltie. To which it was Answered for us, that by the Contract the Suspender did Sell and Dispose the Hydes, and had the first of *June* allowed him for Delivery; So that he ought to have offered the Hydes within that Space, or otherways was Lyable. 2. Et separatim, we offered us to Prove that we came to *Weick* with two Boats before the first of *June*, but were Delayed by the Suspender until the 4th. of *June*, and that then when he offered the Hydes, a great part of them were found insufficient; as an Instrument produced thereon, and Subscribed by the said *Gilzean* one of the Makers as witness doth Testifie. To which it being Replied by the Suspender that he Opposed the Contract, which only Bound to the Delivery, when, or if called for: As also, that I the said *Fordice*, the Oversman could give no Determination in the said Matter after the Elapsing of the said Day, unless the Submission in the Contract had been Prorogat by Writ: The Lord Ordinar found it relevant to Bleid the Charge that we did not require the Hydes before the first of *June*; but found the Reply that the Day of Delivery was of Consent Prorogat to a longer Day relevant, but to be Proven *Scripto vel Juramento* of the Suspender to cleid the Reason; And also found that the Decreet Arbitral subscribed so long after the Day in the Submission could not be Obligator; whereupon, we dissenting Craved your Lordships Answer, which the Lord Ordinary refused; But allowed us to Apply by a Bill, as we now humbly do; And with all Represent to your Lordships,

1. That

Instrument

1. That *esto* that by the Contract we were obliged to have called for the Hydes; yet it is sufficient for us, if we offer to prove the same by Witnesses, seeing that is the only ordinary Probation in such cases: For, though we had taken an Instrument, which was the utmost we could do; yet an Instrument is not a Probation *scripto vel juramento*; but in effect resolves upon the Instrumentary Witnesses: whereby it is evident, that if we prove our coming with our Boats, and calling for the Hydes before, or upon the first of *June*, by abundance of Witnesses; it is in this case sufficient, and as much as we had taken Instruments which was the utmost could be done. And the truth is, our coming there with two Boats was a matter so notour, and we have so many Witnesses that can prove our calling for the said Hydes, and our being put off till the fourth of *June*, which was the only thing that hindered us to take Instruments: That we hope your Lordships will allow us the forsaide Probation without an Instrument, which at best is only a Formality, resolving as said is, upon the Depositions of the Witnesses. But 2. *Esto* the Formality of an Instrument were necessary, as we hope your Lordships will not find, when so full a Probation is offered; then we do alledge, that upon the 5th of *June*, there was a full Instrument taken of the Suspenders offer, to deliver upon the 4th of *June*, and of our refusing because of the insufficiency of the Hydes; which Instrument joyned with the former Probation supplies all that can be required in this case. Nor can we be obliged to prove *scripto vel juramento* of the Suspenders, that the day of the Delivery was prorogated to the 4th of *June*, seeing that we offer both to prove our calling for the Hydes before the first of *June* by Witnesses beyond exception: and our Instrument thereafter taken, proves, that the Suspenders himself, offered the Hydes on the 4th: which being a plain Deed stronger than consent, and always probable by Instrument and Witnesses, it were very hard in this case, to put us either upon Writ or Oath of the Suspenders. And we humbly beseech your Lordships, what in a Bargain of this kind could be more done? We keep our day by coming with Boats, and calling for the Hydes; the Suspenders puts us off for four days longer, and on the fourth day offers us the Hydes, as our Instrument proves. Are we not then every way in the same case, as if we had required by Instrument within the day, since an Instrument of the Suspenders offer after the day with the full Probation by Witnesses? Which we are content to adduce, doth fully supply it. The Suspenders makes a Clamor, as if we had been purposed to insnare him; when it is evident, that all the design was on his part to put a Trick upon us, by delaying us till after the first of *June* as said is. And 3. As for the Decree Arbitral that the Ordinary rejected, we humbly conceive that its not properly a Decree Arbitral, but a plain Reference made by the said Contract to me the said *Fordice, sine die*; so that I not being bound to a day, a Prorogation in Writ was altogether needless, but my Declaration though several Months thereafter, is sufficient. And seeing that these Grounds are clear and evident;

Therefore I beseech your Lordships to find my Instrument with the Witnesses, that I am content to adduce in manner foresaid, sufficiently probative in this Matter; as also to sustain the foresaid Declaration of the Damage, since the emitting thereof was not tyed to any certain day, as is clear by the Contract, according to Justice, and your Lordships Answer.